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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

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In Re Applications of)

LIBERTY CABLE CO., INC. and)
BARTHOLDI CABLE)

For Private Operational Fixed)
Microwave Service Authorizations and)
Modifications)

New York, New York)

Federal Communications Commission
Office of Secretary

WT DOCKET NO. 96-41

To: Hon. Richard L. Sippel, Administrative Law Judge

**TIME WARNER CABLE OF NEW YORK CITY AND
PARAGON CABLE MANHATTAN'S STATUS REPORT**

Pursuant to the Presiding Judge's Order, released April 21, 1997,¹ Time Warner Cable of New York City and Paragon Cable Manhattan (collectively, "TWCNYC") submit this Status Report regarding its position on two issues presented in the Order. First, TWCNYC concurs with the Presiding Judge's opinion that at the hearing, scheduled to commence May 28, 1997, Mr. Nourain "should be questioned fully on the two Nourain Affidavits." Second, TWCNYC believes that the hearing testimony of Messrs. Price and McKinnon concerning the hard wire franchise issues is unnecessary.

¹Memorandum Opinion and Order, WT Docket No. 96-41, FCC 97M-63 (rel. April 21, 1997).

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List A B C D E

I. Mr. Nourain's Testimony Is Necessary To Complete The Record For An Initial Decision.

The record contains two affidavits signed by Mr. Nourain which include statements regarding Mr. Nourain's knowledge of TWCNYC's petitions to deny OFS applications filed by Liberty Cable Co., Inc. ("Liberty"). In a February 23, 1995 affidavit filed in a United States District Court case, Mr. Nourain clearly acknowledges that he was "advised that Time Warner has opposed Liberty's pending applications to the Federal Communications Commission for various 18 Ghz microwave licenses."² To the contrary, in a May 17, 1995 affidavit filed with the Commission in support of the captioned applications, Mr. Nourain denies knowing of TWCNYC's petitions to deny Liberty's microwave applications until April 1995.³ The Commission, in the HDO, determined that Mr. Nourain's inconsistent statements in the two affidavits presented a "material and substantial question as to whether Liberty engaged in misrepresentation to the [Federal Communications] Commission in connection with [its] applications."⁴ The HDO designated an issue to that effect.⁵

The record is incomplete regarding Liberty's alleged misrepresentation to the Commission as evidenced by Mr. Nourain's inconsistent affidavits. At his May 29, 1996 deposition, Mr. Nourain made a distinction that he had not made before -- between the microwave applications for facilities to serve new Liberty customers and facilities to replace

²Response to Surreply, Attachment 2, p. 3, cited in Hearing Designation Order and Notice of Opportunity for Hearing ("HDO"), WT Docket No. 96-41, FCC 96-85 (rel. Mar. 5, 1996), ¶ 8.

³Surreply, May 17, 1995.

⁴HDO, ¶ 20.

⁵Id. at ¶ 30(3).

existing hardwire connections used by Liberty to serve its current customers. Mr. Nourain testified that he learned about TWCNYC's petitions to deny from Mr. McNaughton (Liberty's counsel) in February 1995, but understood that the petitions only related to applications filed to replace hard wire connections. He also testified that Mr. Lehmkuhl informed him that TWCNYC was filing petitions to deny against Liberty's applications in April 1995.⁶

At the January 1997 credibility hearing, questioning concerning Mr. Nourain's conflicting statements was not permitted pursuant to the Order setting that hearing.⁷ However, after Mr. Nourain was excused as a witness at the credibility hearing, there was abundant testimony supporting the view that Mr. Nourain had knowledge of TWCNYC's petitions to deny prior to April 1995. Mr. Lehmkuhl testified that he discussed TWCNYC's petitions to deny with Mr. Nourain in January 1995 and that he never suggested that the petitions were limited to only certain applications.⁸ Furthermore, Liberty received copies of all petitions to deny.⁹

Mr. Nourain has not provided any hearing testimony on the designated issue related to his inconsistent affidavits. Significantly, until Liberty's recent disavowal of Mr. Nourain's hearing testimony, Liberty relied on Mr. Nourain to support its position. In light of the HDO's specific reference to the issue, Mr. Lehmkuhl's testimony regarding Mr. Nourain's

⁶Liberty/Bureau Exhibit 7 (Nourain 5/28/96 Deposition), pp. 172-75; 223-24.

⁷Memorandum Opinion and Order, WT Docket No. 96-41, FCC 96M-265 (rel. Dec. 10, 1996), at 2 n.2.

⁸Lehmkuhl, Tr. 1096-97, 1189-90.

⁹Barr, Tr. 1815-16; Price, Tr. 1435-36; Lehmkuhl, Tr. 1096-97, 1189-90.

knowledge of TWCNYC's petitions and Liberty's reliance on Mr. Nourain throughout this case, Mr. Nourain should be examined at the hearing about the inconsistent statements in his two affidavits.¹⁰

II. TWCNYC Desires To Offer No Additional Evidence On The Hardwire Issues.

TWCNYC fully presented its evidence regarding the hard wire franchise issues in conjunction with the Combined Opposition to Joint Motion for Summary Decision ("Opposition"), filed September 13, 1996. TWCNYC relies on its Opposition, the Opposition's exhibits, and the exhibits attached to the Joint Motion for Summary Decision, together with the deposition testimony and documents that are already in the record to assert its position on the hard wire issues. TWCNYC assumes that all of the exhibits offered in support of the Joint Motion and in support of the Opposition are in the record of this proceeding and may be used by the Presiding Judge in an Initial Decision.

III. TWCNYC Requests The Opportunity To Comment On The Appropriate Penalty.

As part of the arrangement between Liberty and the Wireless Telecommunications Bureau whereby the Bureau agreed to joint Liberty in moving for summary decision, Liberty agreed not to oppose the Bureau's recommendation of forfeiture of a certain amount. Accordingly, the Joint Motion argues that a forfeiture in an amount of approximately \$800,000.00 is an appropriate sanction. Joint Motion at ¶¶ 110, 119-24.

In the Opposition, TWCNYC only briefly discussed the penalty since its position was -- and is -- that a hearing was required. Up to this point, the hearing that was held was

¹⁰See Surreply, May, 17, 1995; see generally Joint Motion for Summary Decision, July 15, 1996.

circumscribed, and the Presiding Judge had neither granted nor denied the Joint Motion. In the Opposition, TWCNYC and Cablevision requested the opportunity to brief the penalty issue once the Presiding Judge ruled on the Joint Motion. TWCNYC reiterates that request here. If, as it appears, the Presiding Judge has determined to write an initial decision based on all the evidence admitted in the hearing as well as the exhibits to the Joint Motion and Opposition, then TWCNYC requests the opportunity to address the penalty issue in its post-hearing paper already scheduled to be filed.

CONCLUSION

The Presiding Judge should permit additional questioning of Mr. Nourain regarding the inconsistent testimony in his two affidavits. Furthermore, no additional testimony or documentary evidence is required for the Presiding Judge to render an initial decision on the hard wire franchise issues.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "R. Bruce Beckner", is written over a horizontal line.

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Dated: April 30, 1997

CERTIFICATE OF SERVICE

I, R. Bruce Beckner, hereby certify that a copy of the foregoing Time Warner Cable of New York City and Paragon Cable Manhattan's Status Report was served, via facsimile and first class mail, this 30th day of April, 1997 upon the following:

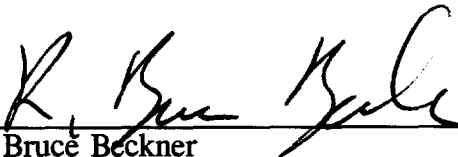
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